BORNEO AIRWAYS LTD. v. THE COMMISSIONER OF INLAND REVENUE, KUCHING; HARPER GILFILLAN (BORNEO) LTD. v. SAME

[P.C. (Lord Hodson, Lord Diplock and Sir Garfield Barwick) July 28, 1969]

[Privy Council Appeal No. 18 of 1968]

Income Tax — Companies resident in Sarawak — Branches established in Sabah and Brunei but carrying on a single integrated trade only — Profits made in Sarawak — Losses at Sabah and Brunei branches — Inland Revenue Ordinance, 1960 (Sarawak), ss. 28, 29 and 43 — Computation of profits under s. 43 on whole basis — Is computation of losses on similar basis, by virtue of s. 29 — Whether s. 29 to be construed as modified by s. 28(1) — Meaning of "loss attributable to activities in Sarawak".

Corporation Tax — Assessment — Companies resident in Sarawak having branches in Sabah and Brunei — Losses in branches.

This was an appeal from a judgment and order of the Federal Court ([1968] 1 M.L.J. 144) dismissing an appeal against a judgment of the High Court in Borneo which consolidated and then dismissed the appeal of the appellants against the decision of the Commissioner of Inland Revenue confirming assessments of corporation tax made on the appellants.

Each appellant during the relevant tax years carried a single integrated trade or business of which the control and management was exercised in Sarawak. But the trade or business in each case was carried on also in the States of Sabah and Brunei in which areas the appellants maintained branches. The appellants had agreed with the respondent upon figures for all the years respectively relevant to the appeals which, should the question become material, may be taken as indicating the profit or loss as the case may be of their respective business and of the various branches. The agreed figures showed in the case of the first-named appellant that in each of the tax years 1959-1962 inclusive a loss was sustained both in the trade or business as a whole and in each of the branches. But in the tax years 1963-1965 inclusive that appellant made a profit in the trade or business both as a whole and in every branch. In the case of the second appellant, those figures showed that in the year 1962 there was a loss both in the trade or business as a whole and in each branch: in the year 1963 there was an overall loss and a loss in each branch but one in which there was a profit: in the year 1964 there was a profit both overall and in each branch.

The appellants were assessed on the footing that only the losses shown in relation to the Sarawak branch in these figures could be carried forward and set off against the profits of the subsequent years. The appellants claimed that because the control and management of their respective trade or business was exercised in Sarawak the whole of their loss should be carried forward and set off against such profits.

The question raised by the appeal was whether in the assessment of corporation tax the appellants were entitled to carry forward the whole amount of their respective accumulated losses or whether they were entitled to carry forward only so much of those losses as were "attributable to" their respective activities in Sarawak.

The appellants contended that the control and management of the appellants' business in Sarawak was relevantly an activity in Sarawak.

Held, dismissing the appeal: (1) the crucial words of section 28 of the Inland Revenue Ordinance, 1960, as far as the present appeal is concerned are "the amount of such loss attributable to activities in Sarawak and shall be set off, etc." The legislature has made it abundantly clear that it does not propose to allow the deduction of the whole of the loss — i.e. in the instant case, the whole of the overall loss. Only some of that loss is to be set off, and be capable of being carried forward. That position is described in unambiguous language. What may be deducted or set off is that part of the overall loss which is "attributable to activities in Sarawak". That the appellants have activities in Sarawak and as well activities beyond Sarawak is beyond question. That it is possible to determine albeit in some circumstances with difficulty and perhaps only by approximation the financial result of those activities can scarcely be denied. Indeed, the parties have done so in the agreed figures. The result of applying the Ordinance in this case is that only those amounts may be set off which have been designated by the parties in those agreed figures as losses in Sarawak;

(2) the operation of section 43 is fully reflected in the computation under section 22 of the profit or of the loss as the case may be. Section 43 cannot be made to do double service either by creating an exception to section 28, which clearly it does not, or by denying any effect to the limitation contained in section 28 as to the portion of an overall loss which may be carried forward;

(3) the assessments made on the appellants were rightly made.

PRIVY COUNCIL consolidated appeal heard on June 30 & July 1, 1969.

H.H. Monroe, Q.C. and *G. Starforth Hill* for the appellants.

R.E. Borneman, Q.C. and *Steward Bates* for the respondents.

Sir Garfield Barwick (delivering the judgment of the Board): This is an appeal from a judgment and order of the Federal Court of Malaysia dismissing an appeal against a judgment of the High Court in Borneo which consolidated and then dismissed the appeals of the appellants against the decision of the Commissioner of Inland Revenue confirming assessment of corporation tax made on the appellants.

The question raised by the appeal is whether in the assessment of corporation tax the appellants are entitled to carry forward the whole amount of their respective accumulated losses or whether they are entitled to carry forward only so much of those losses as are "attributable to" their respective activities in Sarawak.

Each appellant during the relevant tax years carried a single integrated trade or business of which the control and mangement was exercised in Sarawak. But the trade or business in each case was carried on also in the States of Sabah and Brunei in which areas the appellants maintain branches. The appellants have agreed with the respondent upon figures for all the years respectively relevant to the

appeals which, should the question become material, may be taken as indicating the profit or loss as the case may be of their respective business and of the various branches. The agreed figures show in the case of the first-named appellant that in each of the tax years 1959-1962 inclusive a loss was sustained both in the trade or business as a whole and in each of the branches. But in the tax years 1963-1965 inclusive that appellant made a profit in the trade or business both as a whole and in every branch. In the case of the second appellant, those figures show that in the year 1962 there was a loss both in the trade or business as a whole and in each branch, in the year 1963 there was an overall loss and a loss in each branch but one in which there was a profit: in the year 1964 there was a profit both overall and in each branch.

The appellants were assessed on the footing that only the losses shown in relation to the Sarawak branch in these figures could be carried forward and set off against the profits of the subsequent years. The appellants claim that because the control and management of their respective trade or business is exercised in Sarawak the whole of their loss should be carried forward and set off against such profits.

Under the Inland Revenue Ordinance 1960 of Sarawak, corporation tax is charged for each year of assessment on every corporation carrying on any trade, profession or business in Sarawak in respect of the profits of the corporation accruing in, derived from or received in Sarawak from such trade or business. Any sum accruing in, derived from or received in Sarawak, other than a sum from the sale of capital assets, received by or credited to such a corporation shall be deemed to accrue from such trade, profession or business (section 18). The assessable profits for any year of assessment from any trade, profession or business carried on in Sarawak shall be computed on the full amount of the "profits" accruing in, derived from or received in Sarawak during the year preceding the year of the assessment, which is the basis period for the year of assessment. From such "profits" all outgoings and expenses wholly and exclusively incurred during that basis period by the corporation in the production of those profits shall be deducted to ascertain the assessable profits (section 22). It is apparent that the expression the "full amount of the profits" in this section refers to the gross income of the corporation from the trade, profession or business. Such "profits" are to include all profits from business transacted in Sarawak whether directly or through an agent (section 42(1)). But notwithstanding this provision "for the purposes of assessment . . . . the whole of the income derived by any person from any trade, profession or business shall be deemed to accrue in, be derived from or be received in Sarawak if the control or management of such trade, profession or business is exercised in Sarawak" (section 43). It is thus quite plain that in the computation of the assessable profits of a corporation, which conducts a trade, profession or business the control and management of which is exercised in Sarawak the earnings of that trade, profession or business whence so ever derived are to be included in the "full amount of the profits accruing in, derived from or received in Sarawak" for the purpose of computing the assessable income under section 22 of the Ordinance. It follows that in a case where such a computation under section 22 is made results in an assessable profit, no dissection of those earnings as between the branches of the corporation's business need be made nor any consequence given to the circumstance if it be the fact that in the basis period one or more of the branches was or were unprofitable.

However if such a computation results in a loss then section 28 of the Ordinance comes into play. Because tax is charged annually upon a year's financial experience losses of a year or years prior to the basis year cannot be set off so as to reduce the profits of the basis year unless the taxing statute makes provision for such set off or deduction. Whether or not such a provision should be made and the extent to which, if made, the set off or deduction should be allowed is a matter for the legislature enacting the taxing statute. Once such a provision is made, the court's task is merely one of construction of the words used, although in case of ambiguity, that construction will be favoured which seems to the court more consonant with fairness in the circumstances. Where words are clear no such question arises.

Thus in the Ordinance sections 28 and 29 are the relevant provisions allowing the set off or deduction in a year of assessment of losses in the basis year or in a year prior thereto. Their Lordships might observe in passing that they have great difficulty in envisaging a case in which there would be both assessable profits and a loss within the meaning of section 28 in the same basis period. But even if for that reason section 28(1) can have little or no operation section 28(2) will operate to allow a loss of a basis period to be carried forward from year to year till it is exhausted by set off against subsequent profits. The loss which emerges in a basis period will have been computed in the case of a corporation whose trade, profession or business is controlled or managed in or from Sarawak in the same way as assessable profits would have been computed namely by bringing to account the whole of the earnings of the

trade, profession or business wherever carried on and then deducting the permissible outgoings and expenses. For that procedure section 29 provides when it says "for the purposes of section 28 the amount of any loss incurred by a person chargeable to tax under this Part, shall be computed in like manner as assessable profits are computed".

From section 28 there is no exception. It applies in every case where a loss is incurred in the basis period for any year of assessment by a person (which by definition includes a corporation — section 2(1)) chargeable to tax.

In relation to the case of these appellants, a computation under section 22 assisted by section 43 in the manner indicated showed an overall loss on certain of the tax years: thus section 28 operated in relation to those years.

The crucial words of section 28 as far as the present appeal is concerned are "the amount of such loss attributable to activities in Sarawak and shall be set off, etc." The legislature has made it abundantly clear that it does not propose to allow the deduction of the whole of the loss — i.e. in the instant case, the whole of the overall loss. Only some of that loss is to be set off, and be capable of being carried forward. That position is described in what to their Lordships is unambiguous language. What may be deducted or set off is that part of the overall loss which is "attributable to activities in Sarawak". That the appellants have activities in Sarawak and as well activities beyond Sarawak is beyond question. That it is possible to determine albeit in some circumstances with difficulty and perhaps only by approximation the financial result of those activities can scarcely be denied. Indeed, the parties have done so in the agreed figures. The result of applying the Ordinance in this case is that only those amounts may be set off which have been designated by the parties in those agreed figures as losses in Sarawak.

The appellants contended that the control and management of the appellants' business in Sarawak was relevantly an activity in Sarawak. Their Lordships, like the court below, are unable to agree with this contention. The operation of section 43 is fully reflected in the computation under section 22 of the profit or of the loss as the case may be. Section 43 cannot be made to do double service either by creating an exception to section 28, which clearly it does not, or by denying any effect to the limitation contained in section 28 as to the portion of an overall loss which may be carried forward.

Their Lordships are of opinion that the assessments made on the appellants were rightly made.

Their Lordships will accordingly report to the Head of Malaysia their opinion that this appeal should be dismissed and that the appellants should pay the respondent's costs of this appeal.

Appeal dismissed.

Solicitors: *Coward, Chance & Co.; Stephenson Harwood & Tatham.*

PUBLIC PROSECUTOR v. LEE HONG KEE

[A.Cr.J. (Chang Min Tat J.) October 3, 1968]
[Ipoh — Criminal Appeal No. 37 of 1968]

Road Traffic — Permitting car to be used by unlicensed driver — User without valid insurance policy — Charge — Road Traffic Ordinance, 1958, ss. 25(2), 138(2), 146.

Criminal Law and Procedure — Charge — Wrong section — Where no miscarriage of justice — Amendment.

Road Traffic — Disqualification — Special reasons — Enhancing period of disqualification — Road Traffic Ordinance, 1958, s. 74(2).

The respondent was teaching his wife to drive. She held no licence competent or provisional. He was charged and convicted on an offence of permitting his car to be used by an unlicensed driver under section 138(2) of the Road Traffic Ordinance and further of such user without a valid policy of insurance in respect of third party risks and was fined $20 on the first charge and $90 on the second and was ordered to be disqualified from driving for 6 months.

On appeal by the Deputy Public Prosecutor,

Held, allowing the appeal: (1) the charge as framed while technically incorrect did specify the offence of permitting the user on the public road by an unlicensed driver and it was clear that in no instance was the respondent ever misled. Therefore no miscarriage of justice had resulted, and the charge could accordingly be amended to bring it under section 25(2) and punishable under section 146 of the Ordinance;

(2) the law in section 74(2) of the Ordinance lays down a statutory minimum period of disqualification of 12 months and with powers to the trial magistrate to increase that period. If there are special reasons he could consider them and in a proper case order reduction of the period to less than 12 months, but he must state what the special reasons he found were. In this case it was clearly the duty of the magistrate to apply the law as enacted by the legislature. The period of disqualification of 6 months should therefore be set aside and a period of 12 months substituted.

Per Curiam: "It occurs to me that I have spent a lot of my time in criminal appeals amending the charges of lower courts and I would therefore exhort the learned Deputy Public Prosecutor to ensure that his prosecuting officers would frame the correct charges and if they were in any doubt as to so doing to offer his assistance to such prosecuting officers".

Cases referred to:—

(1) *Public Prosecutor* v. *M. Karthiah* [1953] M.L.J. 52.

(2) *Re Kanapathipillai & Ors.* [1960] M.L.J. 243.